Indrani a/p Rajaratnam & Ors v Fairview Schools Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–66 OF 1995
NH CHAN, SITI NORMA YAAKOB JJCA AND KC VOHRAH J
14 JUNE 1997

Civil Procedure *— Appeal — Appeal from dismissal of oral application by High Court judge — Application by appellant under O 38 r 2(3) of Rules of the High Court 1980 for cross-examination of respondent's deponents — Whether cross-examination should have been permitted — Whether judge had considered relevance of cross-examination*

Civil Procedure *— Appeal — Discretion exercised by trial judge — Dismissal of application under O 38 r 2(3) of Rules of the High Court 1980 — Whether judge exercised discretion correctly in dismissing application — Whether judge took into account relevant considerations*

Civil Procedure *— Appeal — Right of appeal — Decision of High Court judge — Appellant petitioners for winding up applied orally for cross-examination of respondent's deponents — Judge below dismissed application — Whether judge's decision open to appeal under Courts of Judicature Act 1964 s 67(1)*

The appellants first commenced proceedings on 25 August 1994 in the High Court, Kuala Lumpur, where, as the petitioners, they sought the winding up of the respondent under s 218(1)(f) and (i) of the Companies Act 1965 ('the Act'), on the grounds that there has been oppression of minority rights and mismanagement of the affairs of the respondent. On the day of the hearing of the petition, the appellants applied orally to cross-examine the respondent's deponents who had filed lengthy affidavits in answer to the petition. The judge dismissed the application, ruling that the various affidavits filed by both parties were sufficient for a proper hearing of the petition without the need to cross-examine any deponent. Three issues were raised on appeal: (i) whether the judge's decision was appealable; (ii) whether the judge had correctly exercised his discretion; and (iii) whether the appellants' right to cross-examine had been defeated by delay.

Held, dismissing the appeal:

(1) (Per **Siti Norma Yaakob**, **NH Chan JJCA** and **KC Vohrah J** concurring) As to whether the dismissal of the appellants' oral application fell within the ambit of ss 67(1) and 68 of the Courts of Judicature Act 1964 so as to be a judgment or order which was appealable, the instant case was concerned with a substantive application under O 38 r 2(3) of the Rules of the High Court 1980 ('the RHC'). The lack of formal application here which the parties were prepared to do away with due to a constraint of time did not change the character of the application. As such, when the judge decided that the petition could proceed without the necessity of cross-examining any deponent, he had made an order on a

substantive application for which a dissatisfied party could appeal (see pp 60H, 61D–E); *Re Products Ltd* [1985] 1 NZLR 710 distinguished.

(2) (Per **Siti Norma Yaakob JCA**, **KC Vohrah J** concurring) The grant or refusal of an application under O 38 r 2(3) of the RHC was very much an exercise of a judge's power of discretion and the question which had to be determined was whether the judge had exercised his discretion judicially. He had taken into consideration that the appellants had never identified the issues for which they maintained cross-examination had become necessary, nor had they shown that the factual disputes which they alleged were raised by the respondents' affidavits were relevant to their petition to warrant cross-examination. The judge had also taken into consideration the appellants' delay in making the application to cross-examine. Under these circumstances, the trial judge had not erred in law or in principle when he exercised his discretion, as he had put his mind to relevant considerations in deciding as he did (see pp 61F–I, 62A, C).

(3) (Per **KC Vohrah J**, **Siti Norma Yaakob JCA** concurring) It was important to take into account all factors when considering an application for cross-examination and if it has little relevance or little weight to the issue which the judge has to decide, then cross-examination should not be permitted (see p 64B); *Comet Products v Hawkex Plastics* [1971] 1 All ER 1145 and *Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd* [1980] 1 MLJ 189 followed. The judge below had certainly considered the issue of relevancy. He was mindful that although the petition was grounded under s 218 of the Act, yet counsel for the petitioners had argued that cross-examination was necessary because the basis of the petition was not only mismanagement of the affairs of the company, which fell under s 218 of the Act, but also oppression of minority rights, which fell under a different provision, s 181 of the Act. Quite clearly, the bringing in of the ground of oppression of minority rights under s 181 of the Act was completely irrelevant (see pp 64H–65A).

[Bahasa Malaysia summary

Perayu-perayu pada mulanya telah memulakan prosiding pada 25 Ogos 1994 di Mahkamah Tinggi, Kuala Lumpur, di mana, sebagai pempetisyen-pempetisyen, mereka telah memohon penggulungan responden di bawah s 218(1)(f) dan (i) Akta Syarikat 1965 ('Akta tersebut'), atas alasan bahawa terdapat penindasan hak minoriti dan salah pengurusan urusan-urusan responden. Pada hari perbicaraan petisyen tersebut, perayu-perayu telah memohon secara lisan untuk memeriksa balas deponen-deponen responden yang telah memfailkan afidavit-afidavit yang panjang bagi menjawab petisyen tersebut. Hakim telah menolak permohonan tersebut, dengan memutuskan

bahawa pelbagai afidavit-afidavit yang difailkan oleh kedua-dua pihak adalah mencukupi untuk satu perbicaraan yang betul tentang petisyen tersebut tanpa perlu membuat pemeriksaaan balas mana-mana deponen. Tiga persoalan yang ditimbulkan dalam rayuan ini adalah: (i) sama ada keputusan hakim boleh dirayu; (ii) sama ada hakim telah menggunakan budi bicara beliau dengan betul; dan (iii) sama ada hak perayu-perayu untuk membuat pemeriksaaan balas telah ditewaskan oleh kelewatan.

Diputuskan, menolak rayuan tersebut:

(1) (Oleh **Siti Norma Yaakob**, **NH Chan HHMR** dan **KC Vohrah H** bersetuju) Berhubung sama ada penolakan permohonan lisan perayu-perayu jatuh dalam lingkungan ss 67(1) dan 68 Akta Mahkamah Kehakiman 1964 yang menjadikan ia satu penghakiman atau perintah yang boleh dirayu, kes sekarang ini adalah berkaitan dengan satu permohonan yang substantif di bawah A 38 k 2(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Ketiadaan permohonan rasmi di sini yang pihak-pihak telah bersedia untuk tidak menggunakannya oleh sebab kesuntukan masa tidak menukar sifat permohonan tersebut. Oleh itu, apabila hakim memutuskan bahawa petisyen tersebut boleh diteruskan tanpa keerluan pemeriksaan balas mana-mana deponen, beliau telah membuat satu perintah berdasarkan satu permohonan yang substantif di mana satu pihak yang tidak puas hati boleh membuat rayuan (lihat ms 60H, 61D–E); *Re Products Ltd* [1985] 1 NZLR 710 dibeza.

(2) (Oleh **Siti Norma Yaakob HMR**, **KC Vohrah H** bersetuju) Kebenaran atau penolakan satu permohonan di bawah A 38 k 2(3) KMT sememangnya satu penggunaan kuasa budi bicara hakim dan persoalan yang perlu ditentukan adalah sama ada hakim telah menggunakan budi bicara beliau dengan tidak berat sebelah. Beliau telah mempertimbangkan bahawa perayu-perayu tidak pernah mengenalpasti persoalan-persoalan yang mereka telah pertahankan perlunya pemeriksaan balas, mapupun telah mereka tunjukkan bahawa pertikaian-pertikaian berdasarkan fakta yang mereka telah katakan yang ditimbulkan dalam afidavit-afidavit responden-responden adalah berkaitan dengan petisyen mereka untuk mewarankan pemeriksaan balas. Hakim juga telah mempertimbangkan kelewatan perayu-perayu dalam membuat permohonan untuk memeriksa balas. Dalam keadaan ini, hakim perbicaraan tidak khilaf di sisi undang-undang atau secara prinsip apabila beliau menggunakan budi bicara beliau, kerana beliau telah menumpukan perhatian pada pertimbangan-pertimbangan yang berkaitan dalam membuat keputusan seperti yang beliau telah lakukan (lihat ms 61F–I, 62A, C).

(3) (Oleh **KC Vohrah H**, **Siti Norma Yaakob HMR** bersetuju) Adalah penting untuk mengambilkira semua faktor semasa

mempertimbangkan permohonan untuk membuat pemeriksaan balas dan jika ia tidak begitu berkaitan atau penting dengan persoalan yang hakim perlu putuskan, maka pemeriksaan balas tidak sepatutnya dibenarkan (lihat ms 64B); *Comet Products v Hawkex Plastics* [1971] 1 All ER 1145 dan *Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd* [1980] 1 MLJ 189 diikut. Hakim tersebut sememangnya telah mempertimbangkan persoalan yang berkaitan. Beliau sedar bahawa walaupun petisyen tersebut berdasarkan s 218 Akta tersebut, namun begitu peguam bagi pihak pempetisyen-pempetisyen telah menghujahkan bahawa pemeriksaan balas adalah perlu kerana asas petisyen tersebut bukan sahaja tentang salah pengurusan urusan-urusan syarikat, yang jatuh di bawah s 218 Akta tersebut, tetapi juga tentang penindasan hak-hak minoriti, yang jatuh di bawah peuntukan yang lain, s 181 Akta tersebut. Adalah amat jelas, membawa masuk alasan penindasan hak-hak minoriti di bawah s 181 Akta tersebut sama sekali tidak berkaitan (lihat ms 64H–65A).]

Notes

For cases on discretion exercised by trial judge, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 697–711.

For cases on right of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1177–1185.

Cases referred to

Products, Re [1985] 1 NZLR 710 (distd)
Comet Products v Hawkex Plastics [1971] 1 All ER 1145 (folld)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (folld)
Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd [1980] 1 MLJ 189 (folld)

Legislation referred to

Companies (Winding Up) Rules 1972 r 26
Companies Act 1965 ss 181, 218(1)(f), (i)
Courts of Judicature Act 1964 ss 67(1), 68
Judicature Act 1908 [New Zealand] s 66
National Land Code 1965 s 327
Rules of the High Court 1980 O 38 r 2(3)

Appeal from: Companies Winding Up No D5–38–280 of 1994 (High Court, Kuala Lumpur)

Yusof Khan (*Yusuf Lee Pathma & Marbeck*) for the appellants.
Rajendra Navaratnam (*Conrad Young* with him) (*Azman Davidson & Co*) for the respondent.

Siti Norma Yaakob JCA. : Proceedings were first commenced by the appellants on 25 August 1994, in the Commercial Division of the High

Court, Kuala Lumpur, where, as the petitioners, the appellants sought the winding up of the respondent under s 218(1)(f) and (i) of the Companies Act 1965 ('the Act'), on the grounds that there had been oppression of minority rights and mismanagement of the affairs of the respondent.

On the day of the scheduled hearing of the petition, the appellants applied orally to cross-examine the respondent's deponents who had filed lengthy affidavits in answer to the petition. The respondent reluctantly agreed to the application being made orally, but opposed the application to cross-examine the deponents. Abdul Malek Ahmad J (as he then was) dismissed the application. The learned judge also ruled that the various affidavits filed by both parties were sufficient for a proper hearing of the petition without the need to cross-examine any deponent.

In appealing against this decision, three issues were raised before us:

(1) whether the learned trial judge's decision is appealable;

(2) whether the learned trial judge had exercised his discretion correctly; and

(3) whether delay defeats the appellants' right to cross-examine.

Our jurisdiction to hear and determine civil appeals is defined and limited by s 67(1) of the Courts of Judicature Act 1964 ('the CJA'), which states as follows:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

Section 68 of the CJA lists out the circumstances of certain cases for which no appeal shall be brought to the Court of Appeal. These include:

(1) those cases where the amount or value of the subject matter (exclusive of interest) is less than RM250,000, except with leave of the Court of Appeal;

(2) where the judgment or order is made by the consent of parties;

(3) where the judgment or order relates to costs, except with leave of the Court of Appeal;

(4) where, by written law, the judgment or order is expressly declared to be final.

The issue raised is whether the dismissal of the appellants' oral application to cross-examine the respondent's deponents falls within the ambit of ss 67(1) and 68 of the CJA, in that it is a judgment or order which is appealable. The respondent maintains it is not, as it is only a ruling made nin the course of interlocutory proceedings which does not determine the main issue or issues before the court and for this relies on the New Zealand case of *Re Products Ltd* [1985] 1 NZLR 710. There, the Court of Appeal held that the court's jurisdiction to hear and determine appeals conferred by s 66 of the New Zealand Judicature Act 1908 (substantially similar to

s 67(1) of our CJA) is limited to the hearing of appeals against a 'judgment', 'decree' or 'order'. Thus, a ruling by the learned trial judge in that case that a tender made by Products Ltd (the company sought to be wound up) of all sums due to the petitioning creditor was not sufficient in law to establish that was able to settle its debts, was held to be a ruling which confers no right to appeal at all. The petitioning creditor was still entitled, despite its rejection of the tender, to proceed with its petition against . The New Zealand Court of Appeal held that it had no jurisdiction to entertain an appeal from the judge's ruling and that the petitioning creditor was entitled to proceed as the ruling was not a judgment, a decree or an order. The Court of Appeal reasoned that the ruling was a step in the hearing of argument on a petition and it achieved no final disposal of what was before the High Court. A further hearing was necessary as 'a ruling on a question of law not necessarily decisive of the particular issue before the court, shall not be seen in such circumstances as conferring a right of appeal.'

Herein lies the distinguishing mark of this New Zealand case as the decision was reached following arguments on a submission made by one party that was strenuously objected to by the other. Unlike *Products*, our instant case is concerned with a substantive application under O 38 r 2(3) of the Rules of the High Court 1980 ('the RHC'), which, under normal circumstances, would formally be applied by way of summons or motion. In this case, because of the constraint of time, the parties were prepared to do away with such formality, but this does not in itself change the character of the application altogether as it is still made under a specific order and rule which also provide the procedure for doing so. As such, when Abdul Malek Ahmad J (as he then was) decided that the petition can proceed without the necessity of cross-examining any deponent, he had made an order on a substantive application for which a dissatisfied party could appeal.

The grant or the refusal of an application under O 38 r 2(3) of the RHC is very much an exercise of a judge's power of discretion and the question that must be determined is whether Abdul Malek Ahmad J (as he then was) had exercised his discretion judicially. From his written judgment, it is very clear that the learned judge considered the following factors when exercising his discretion.

(1) That the appellants never identified the issues for which they maintain cross-examination had become necessary. This is not surprising as no formal application was made by them. Even so, a perusal of the proceedings recorded by the trial judge fails to disclose what the issues are to warrant cross-examination. Apart from stating orally that the respondent's many affidavits by various deponents raise many disputes as to facts, such disputes have not been identified by the appellants. If indeed there are factual disputes, the appellants have also failed to show whether they are relevant to the petition to warrant cross-examination. On the contrary, the learned trial judge found that the cross-examination would not advance the cause of justice as there is sufficient affidavit evidence supported by contemporaneous

documents to enable the petition to be heard properly without the need of cross-examination. A

(2) That the appellants delayed in making the application to cross-examine. The oral application was made on 24 January 1995, the second time the petition was adjourned to be heard on its merits. The learned trial judge considered that the application should have been made earlier when the petition was initially fixed to be heard on its merits on 20 December 1994. There was no indication then that the appellants intended to cross-examine any of the respondent's deponents even though their affidavits had already been filed in court. B

Under these circumstances, I do not consider that the learned trial judge had erred in law or in principle when he exercised his discretion as he had put his mind to relevant considerations in deciding as he did. To that extent I see no justification in interfering with the order he had made in the court below. C

For the reasons given, this appeal is dismissed with costs and the deposit be remitted to the respondent to account of its taxed costs. D

KC Vohrah J. : In this matter, in the Kuala Lumpur High Court, the learned judge made an order dismissing the application of the appellants ('the petitioners') to cross-examine the affiants of the affidavits filed on behalf of the respondent company ('the respondent') in a winding up petition. The petitioners appeal against this order. E

With respect, I agree with the view and reasons expressed by NH Chan and Siti Norma Yaakob JJCA in their judgments that the order made by the learned judge is an appealable order having regard to s 67(1) of the CJA. I also share their view that the New Zealand case of *Re Products* [1985] 1 NZLR 710 turned on a different point of law and is not relevant for the purposes of this case; the New Zealand Court of Appeal was of the view that the ruling of the High Court judge rejecting the submission made on a mere preliminary question of law in the course of a winding up petition was a step in the hearing of argument on a petition and it achieved no final disposal of what was before the court and was not appealable while the ruling in this matter is one that disposed of a matter, ie there was an application that could be and was allowed to be made under O 38 r 2(3) of the RHC, and the ruling thereon constitutes an order which by virtue of s 67(1) of the CJA is appealable. F G

However, I have to respectfully depart from the view of NH Chan JCA that the appeal should be allowed. I concur with respect with the view of Siti Norma Yaakob JCA that the appeal should be dismissed. H

From the title of the petition for winding up, it is clear that the petition is grounded under s 218 of the Act. The winding up petition appears to be based on two grounds under s 218(1) of the Act, firstly, that the directors had acted in the affairs of the company in their own interest rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members (para (f) of s 218(1) I

of the Act) and, secondly, that it is just and equitable that the company be wound up (para (i) of s 218(1) of the Act).

To set out the background of this case — the hearing of the petition to wind up the respondent (filed on 25 August 1994) came up for the second time before the learned judge on 24 August 1995. At that stage, counsel for the petitioners applied to cross-examine the affiants of the affidavits filed on behalf of the respondents without there being a proper formal application for such purpose. Counsel for the respondents, however, reluctantly agreed to the application being made orally in lieu of the formal application in order to avoid a further delay in the hearing of the petition.

There was confusion as to what the purpose of the proposed cross-examination was for, there being no attempt to show what was needed to be adduced under the proposed cross-examination of the affiants. The learned counsel for the petitioners predicated his oral application on the vague ground that there were so many disputes as to facts that the court would not be able to know what was disputed merely by reading the affidavits. He stressed that 'since (the) basis for the petition is oppression of minority rights and mismanagement of (the) affairs of the company cross-examination is necessary.' He then finally submitted, after counsel for the respondent had made his submission, that 'the basis of the petition is total disregard for minority rights'.

It is not surprising that in opposing the application, learned counsel for the respondent pointed out that no effort had been made to show what the issues were, although the court had discretionary power to direct oral evidence be taken on the petition. He also pointed out that the petition for winding up was based on paras (f) and (i) of s 218(1) of the Act and yet counsel had relied on the ground of oppression of minority rights (s 181 of the Act) to argue that cross-examination was necessary. He also raised the objection that there was delay on the part of the petitioners in making the application.

The learned judge adjourned the hearing to another date to consider the application. At the resumed hearing, he dismissed the petitioners' application. The learned judge held, inter alia, that the counsel for the petitioners had not identified the issues relevant for the proposed cross-examination under s 181 of the Act and that in respect of paras (f) and (i) of s 218 of the Act, various matters raised in the petitioners' affidavits had been replied to in the affidavit filed on behalf of the respondent and the affidavits sufficed for a proper hearing of the petition without the need for cross-examination.

The learned judge also found that there was delay on the part of the petitioners in making the application for the cross-examination of the affiants.

The petition for the winding up of the respondent company is supported, as statutorily required under r 26 of the Companies (Winding Up) Rules 1972, by a verifying affidavit. It was deposed by to by the fifth petitioner and contains a number of allegations of facts which are essentially of a hearsay character. In opposing the winding up petition, three affidavits,

two deposed to by a director of the company and another by the corporate secretary of the company, allege certain facts within their own knowledge which dispute the facts raised in the verifying affidavit and the other two more affidavits deposed to by the fifth petitioner and another deposed to by a former chairman of the respondent where the affiants deposed to facts within their personal knowledge. To be noted is that the petitioners were no longer merely relying on the statutorily required verifying affidavit to the petition to substantiate their allegation of facts.

It is important to take into account all factors when considering an application for cross-examination and if it has little relevance or little weight to the issue which the judge has to decide, then cross-examination should not be permitted. As was reminded by Megaw LJ in *Comet Products v Hawkex Plastics* [1971] 1 All ER 1145 at pp 1146–1147:

> … In general, I think that in interlocutory proceedings, where there is bona fide application to cross-examine a deponent on his affidavit, that application should normally be granted. There can be no suggestion here that the application on behalf of the plaintiffs is anything other than bona fide. But for the second defendant it was said that, against a person whose committal for contempt of court is sought, such an order should be made only in the most exceptional circumstances. I do not accept that. As a general proposition, I think it is too widely stated. But the fact that it is a proceeding which may result in punishment, whether by imprisonment or fine or sequestration, is not irrelevant. It is a proper factor to be taken into consideration by the judge, along with other factors, in proceedings such as this where an application for cross-examination is resisted. What weight it will have must depend on the circumstances of the particular case. In some cases, it may have little or no weight. One feature which may make it of substantial weight is when it becomes apparent that the necessary result of the cross-examination, while the cross-examination is perfectly properly conducted, is likely at the best to have a very small relevance to the issue which the judge has to decide in comparison with the effect it may have on the matters in the litigation, which are not properly in issue on the contempt motion.
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> In my view therefore, the appeal should be allowed and the cross-examination should not be permitted.

It will be noted that in a local case, *Leisure & Allied Industries Pty Ltd v Udaria Sdn Bhd* [1980] 1 MLJ 189, Salleh Abas FJ (as he then was) when dealing with an application by the defendant to cross-examine the plaintiff's witnesses on their affidavits took the same view and proceeded to 'see how the proposed cross-examination would be relevant to the issue' in the plaintiff's application in order for him to exercise his discretion.

The learned judge in this matter under appeal certainly considered the issue of relevancy. The learned judge was mindful that although the petition was grounded under s 218 of the Act, yet counsel for the petitioners had argued that cross-examination was necessary because the basis of the petition is not only mismanagement of the affairs of the company, which falls under s 218 of the Act, but also oppression of minority rights, which falls under a different provision, s 181 of the Act. The notes of proceedings, however, show that at a later stage of the argument, counsel for the

petitioners had, as pointed out earlier, argued that 'the basis of the petition is total disregard of minority rights'. To my mind, quite clearly, the bringing in of the ground of oppression of minority rights under s 181 of the Act is completely irrelevant.

As for the issue under paras (f) and (i) of s 218 (1) of the Act, the learned judge was of the view that 'all that had been raised in the petitioner's affidavit … had in fact been replied by the respondent's affidavit … had in fact been replied by the respondent's affidavits quite adequately …'. This is clearly an indication by the learned judge that he was making short shrift of the argument put forth by counsel for the petitioners (who did not condescend to details) that there were so many disputes as to facts that the court would not be able to know what was disputed by merely reading the affidavits. Implicit in that statement by the learned judge is that the learned judge is able to decide the petition on the evidence before him, which in this case comprises what are alleged in all the affidavits filed in the case. One is reminded of what Lord Diplock had to say in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 at p 217 in respect of a judge resolving conflicts of evidence on affidavits in a case arising under s 327 of the National Land Code 1965:

> … Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he 'may think just', the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of this discretion under s 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong…

The learned judge in disallowing the application for cross-examination had also taken into consideration the matter of delay in making the application for cross-examination. As pointed out by the learned judge, the petition had originally been schedule to be heard on 20 December 1994, but counsel for the petitioners had applied for a postponement to await a decision pending before another judge on two matters, although both counsel for the respondent were prepared to go on with the hearing. The learned judge was of the view that the application to cross-examine should have been made at that juncture or they should have filed a formal application. The point is that no explanation was given for the delay although counsel for the respondent had made issue of it.

A discretion has been vested in the judge under O 38 r 2(3) of the RHC whether to order the attendance for cross-examination of the person making an affidavit on the application of any party and he has exercised his

discretion and it has, to my mind, not been shown that he has exercised his discretion on wrong principles and I think the court should be slow to interfere with the discretion he has exercised.

In all the circumstances of this case, I agree with the view of Siti Norma Yaakob JCA to dismiss the appeal with costs and to order that the sum deposited by way of security for the costs of this appeal be paid to the respondent towards the account of its taxed costs.

Appeal dismissed.

Reported by Anita Teo